CAPITAL INSURANCE BHD

v.

ASIAH ABDUL MANAP & ANOR

FEDERAL COURT, KUALA LUMPUR
CHONG SIEW FAI CJ (SABAH & SARAWAK)
MOHAMED DZAIDDIN FCJ
DENIS ONG JCA
[CIVIL APPEAL NO: 02-1-2000(B)]
28 JULY 2000

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Jurisdiction of - Subject matter of appeal - Whether from judgment of Court of Appeal in respect of any civil cause or matter decided by the High Court in exercise of its original jurisdiction - Courts of Judicature Act 1964, s. 96(a) - Whether issue of jurisdiction already raised at leave application stage could be raised again at appeal*

In the Court of Appeal, the respondents' counsel raised a preliminary objection that the record of appeal was bad in law and ought to be set aside for non-compliance with the Rules of the Court of Appeal 1994 since it did not contain the sealed copy of the judgment appealed from. The Court of Appeal upheld the objection and dismissed the appeal. The appellant appealed to the Federal Court. At the outset of the proceedings, the respondents raised a preliminary objection that the court had no jurisdiction to hear the appeal since the subject matter of the appeal was not from a judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s. 96(a) Courts of Judicature Act 1964. The court raised an interesting point to be considered, *ie*, could the respondents at this stage raise a preliminary objection which had been raised earlier at the hearing of the application for leave to appeal – that the court had no jurisdiction to hear the appeal.

Held:
Per Mohamed Dzaiddin FCJ

[1] The subject matter of the instant appeal was not from a judgment of the Court of Appeal in respect of any cause or matter decided by the High Court in the exercise of its original jurisdiction. This appeal was an appeal from the decision of the Court of Appeal on a preliminary objection taken by the respondents.

[2] Since the preliminary objection was related to the question of the jurisdiction of the Federal Court, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents were entitled to raise this preliminary objection and the court could entertain the application.

[Preliminary objection upheld; appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Dalam Mahkamah Rayuan, peguamcara responden membangkitkan satu bantahan awal yang rekod rayuan tidak tepat disisi undang-undang dan patut diketepikan kerana ketidakpatuhan terhadap Kaedah Mahkamah Rayuan 1994 kerana ianya tidak mengandungi sesalinan bermeterai penghakiman yang dirayui. Mahkamah Rayuan mengesahkan bantahan tersebut dan menolak rayuan tersebut. Perayu merayu ke Mahkamah Persekutuan. Pada permulaan prosiding, responden-responden membangkitkan satu bantahan awal yang mahkamah tidak mempunyai bidangkuasa untuk mendengar rayuan tersebut kerana halperkara rayuan tersebut bukanlah dari penghakiman Mahkamah Rayuan yang berkait dengan sebarang kausa sivil atau perkara yang diputuskan oleh Mahkamah Tinggi di dalam menjalankan bidangkuasa asalnya dalam ertikata s. 96(a) Akta Mahkamah Kehakiman 1964. Mahkamah menimbulkan satu pokok perbincangan yang menarik iaitu samada responden-responden pada peringkat ini boleh membangkitkan satu bantahan awal yang telah dibangkitkan semasa perbicaraan permohonan untuk mendapat kebenaran merayu, bahawa mahkamah ini tidak mempunyai bidangkuasa untuk mendengar rayuan ini.

Diputuskan:
Oleh Mohamed Dzaiddin HMP

[1] Adalah jelas bahawa halperkara rayuan semasa bukan dari penghakiman Mahkamah Rayuan yang berhubung dengan kausa atau perkara yang diputuskan oleh Mahkamah Tinggi di dalam menggunakan bidangkuasa asalnya, kerana rayuan ini sebenarnya adalah rayuan dari keputusan Mahkamah Rayuan terhadap bantahan awal yang dibuat oleh responden-responden.

[2] Olehkerana bantahan awal ini berkait dengan persoalan bidangkuasa Mahkamah Persekutuan dan memandangkan pada peringkat permohonan kebenaran, bantahan awal yang dibangkitkan oleh responden-responden bahawa permohonan untuk kebenaran tidak wajar telah ditolak oleh mahkamah ini, responden-responden berhak untuk membangkitkan bantahan awal ini dan mahkamah ini boleh menimbangkan permohonan ini.

[Bantahan awal disahkan; rayuan ditolak.]

Case(s) referred to:
Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 ***(refd)***
Lam Kong Co Ltd v. Thong Guan Co Pte Ltd [2000] 3 CLJ 769 ***(foll)***
Lane v. Esdaile [1891] AC 210
M Pr Kannappa Chettiar v. LRM Letchumanan Chettiar [1952] 18 MLJ 188 ***(foll)***
Penang Port Commission v. Kanawagi Seperumaniam [1997] 1 CLJ 434

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Rules of the Court of Appeal 1994, rr. 18(4)(d), (7)

For the appellant - V Sivaparanjothi (Manjit Singh, Sri Kumar & S Rutheran with him); M/s Sri Ram & Co
For the respondents - Yusuf Khan Ghows Khan (BS Sidhu & Sharon Sidhu with him); M/s BS Sidhu & Co

[Appeal from Court of Appeal; Civil Appeal No: B-02-155-1995]

Reported by Izzaty Izzuddin

JUDGMENT

Mohamed Dzaiddin FCJ:

This appeal came up for hearing before us on 9 May 2000. The panel was headed by Tan Sri Chong Siew Fai, Hakim Besar Sabah & Sarawak.

At the outset of the proceeding, Encik BS Sidhu, counsel for the respondents raised a preliminary objection in respect of the jurisdiction of this court to hear the appeal. Notice of the preliminary objection was given to the appellant's solicitors by fax on 5 May 2000.

The sole ground of the objection is that the subject matter of the appeal is not from the judgment of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction within the meaning of s. 96(a) of the Courts of Judicature Act 1964 (the Act). It was the contention of the respondents' counsel that the present appeal is in respect of the decision of the Court of Appeal on a preliminary objection taken up on behalf of the respondents before the hearing of the appeal on the merits.

The Record of Appeal established the following facts. On 26 August 1999 when the appeal came up for hearing before the Court of Appeal, counsel for the respondents raised a preliminary objection that the record of appeal was bad in law and ought to be set aside for non-compliance with rr. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994. The reasons for non-compliance were that the record did not contain the sealed copy of the judgment of the court below and it did not contain a copy of the order of the court.

After hearing counsel, the Court of Appeal upheld the preliminary objection of the respondents and dismissed the appeal. In its written grounds of judgment delivered on 6 December 1999, the court per Mokhtar Haji Sidin HMR held as follows (AR 438-439):

> The issue whether the appeal record should be set aside on the ground of non-compliance with the Rules of the Court of Appeal was not decided by the Federal Court. As such the respondents have the right to raise that issue before us. Further, we are of the view the issue of non-compliance with the Rules is by itself a merit to be decided in this appeal. It is clear to us that when the appeal record is not filed or defective then there is no appeal before us for which we could consider.
>
> For the above reasons we uphold the preliminary objections by the respondents. We hold that the appeal record and the supplementary appeal record are defective. We also hold that the supplementary appeal record was filed out of time without any leave of the Court. Therefore, there is no proper appeal record before us for us to consider. This appeal is hereby dismissed with costs. Costs awarded is for a single counsel. Deposit to the respondent towards account of taxed costs.

After hearing submissions of counsel, we reserved our decision on the preliminary objection to a later date to enable Justice Denis Ong, HMR to have a look at the latest decision of the Federal Court on a similar point in the case of *Lam Kong Company Ltd. v. Thong Guan Co. Pte. Ltd.* [2000] 3 CLJ 769. In the meantime, on 3 July 2000, Tan Sri Chong Siew Fai, Hakim Besar Sabah & Sarawak retired and ceased to exercise his function as a judge of this court. However, under s. 78(1) of the Act, the remaining two judges shall, for the purpose of this proceeding, be deemed to be duly constituted notwithstanding the inability of Tan Sri Chong Siew Fai to act as a judge. In addition, under para. (2), the proceeding shall be determined in accordance with the opinion of the majority of the remaining two judges, and if there is no majority the proceeding shall be reheard.

Accordingly, after considering the background facts and the authorities, we agree with counsel for the respondents that the present appeal is from the decision of the Court of Appeal on a preliminary objection taken by the respondents in which the court held that the appeal record and the supplementary appeal record were defective for non-compliance of rr. 18(4)(d) and 18(7) of the Court of Appeal Rules 1994. As was stated in *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors* [1995] 3 CLJ 485 it is an elementary proposition that this court is a creature of statute and that equally a right of appeal is also a creature of statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies. Thus, it is patently clear that the

subject-matter of the present appeal is not from the judgment of the Court of Appeal in respect of the cause or matter decided by the High Court in the exercise of its original jurisdiction. The material part of s. 96(a) of the Act reads as follows:

> [A]n appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court ...
>
> (a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction ...

A similar question arose in *Lam Kong supra*, on whether the decision of the Court of Appeal, upon a motion by the respondent, striking out the applicant's notice of appeal for non-compliance with s. 68(1)(a) was appealable to the Federal Court under s. 96(a) of the Act. The Federal Court, by a majority decision, held it was not appealable because the application for leave was not based on the judgment or order of the Court of Appeal in respect of a civil cause or matter decided by the High Court. The majority decision in *Lam Kong* followed *Auto Dunia* which held that the refusal of leave to appeal by the Court of Appeal was not a judgment or order within the meaning of s. 96(a) of the Act. More importantly, *Lam Kong* stressed that the policy consideration in *Auto Dunia*, following *Lane v. Esdaile* [1891] AC 210 should be adhered to, otherwise the "introduction of the 'filter' requiring leave would be pointless." Needless to say, we are in complete agreement with the reasoning and conclusion of the majority judgment of *Lam Kong*.

Accordingly, we uphold the preliminary objection and dismiss this appeal with costs. Deposit to be paid to the respondents to account of their taxed costs.

There is however one interesting point which deserves our consideration. From the chronology of events, on 17 February 2000 an application for leave to appeal against the Court of Appeal decision was granted by this court in which I sat as a panel member. A preliminary objection taken by the respondents that the application was improper was summarily dismissed by the court. In view of leave to appeal having been granted earlier by this court, can the respondents raise here a preliminary objection that this court has no jurisdiction to hear the appeal?

Encik Yusuf Khan for the respondents contended that they can raise the issue of want of jurisdiction at this stage. He reasoned that s. 96 of the Act basically deals with the jurisdiction of the Federal Court to hear appeals from the Court of Appeal upon leave being granted. He submitted

that in the present case the Federal Court at the leave stage did not decide the issue of jurisdiction on the merit, but in granting leave to appeal, he said the court considered "the appropriateness of matters raised for appeal becoming the subject of appeal." Hence, since the issue of jurisdiction was not considered by the earlier panel when granting leave to appeal, the respondents are entitled to raise the issue here. Counsel relied on the decision of the Court of Appeal in *Penang Port Commission v. Kanawagi a/l Seperumaniam* [1997] 2 MLJ 300 which held (at p. 302):

> The dismissal of the respondent's application for leave to appeal by the Federal Court could not be taken as a decision of the Federal Court on merit of the issue of jurisdiction of the Court of Appeal because in an application for leave to appeal, the Federal Court considered whether or not there existed the question of law involving public interest.

In our view, there is much force in the submission. Since the preliminary objection relates to the question of jurisdiction of the Federal Court to hear appeals from the Court of Appeal, and noting that at the leave stage the preliminary objection taken by the respondents that the leave application was improper was summarily dismissed by this court, the respondents are entitled to raise this preliminary objection and this court can entertain the application. In this regard, we would rely on the decision of Thomson, J in *M. Pr. Kannappa Chettiar v. L.R.M. Letchumanan Chettiar* [1952] 18 MLJ 188. In an application to the High Court by way of an appeal from the decision of the Rent Assessment Board, the Board refused permission to the appellant to apply to the appropriate court for ejectment of the respondent. It was held that the High Court has no jurisdiction to entertain appeals from any statutory tribunals unless such jurisdiction is expressly given by the statute. In his judgment, Thomson, J (as he then was) stated (at p. 190):

> I would add that I have considered the question of whether in view of the fact that the point of want of jurisdiction was not taken by either of the parties I should not hold that it has been waived. On such a point, however, it seems to be that where there is a complete lack of jurisdiction there can be no question of waiver and that it is the duty of the Court to take and deal with the point if it is not raised by the parties. As was said by Viscount Simon, LC, in the case of *Westminster Bank Ltd v. Edwards* (8):
>
> > A court not only may, but should take objection where the absence of jurisdiction is apparent on the face of the proceedings. Thus, an appellate court not only may, but must, take the objection that it has no jurisdiction to hear an appeal if it is apparent that no right to appeal exists. Vaughan Williams, LJ in *Norwich Corporation v. Norwich*

> *Electric Tramways Co., Ltd.,* formulated the proposition thus: 'If the court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself.

In conclusion, I would like to put it on record that I have shown this judgment in draft to my learned brother Denis Ong HMR, who agreed with the reasoning and the conclusion.